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Nos. 251 and 252

In the Supreme Court of the United States

OCTOBER TERM, 1957

PANAMA CANAL COMPANY, PETITIONER

v.

GRACE LINE, INC., ET AL.

GRACE LINE, INC., ET AL., CROSS-PETITIONERS

v.

PANAMA CANAL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE PANAMA CANAL COMPANY IN OPPOSITION TO THE APPLICATION OF GRACE LINE, INC., ET AL., FOR AMENDMENT OF OPINION

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The Panama Canal Company opposes the application of Grace Line, Inc., et al., for amendment of the opinion rendered on April 28, 1958, in these cases. 356 U. S. 309. We submit that the Court's opinion fairly describes the issues raised by the proceedings.

I

The first part of respondents' application objects to those parts of the opinion which state that this litigation involves questions of accountancy and cost allocation, in addition to bare questions of statutory interpretation. These objections, although not new,[1] are curious in view of respondents' own briefs on the merits. Their Main Brief, Part One, Point III (pp. 53–68),[2] is largely devoted to accounting problems, some of those matters being as complicated as write-ups of the capital account, and reductions of accumulated depreciation (pp. 61–62, 65). Our briefs, too, discuss in detail the questions of accountancy, allocation and pricing which underlie this litigation; and they explain the close and direct bearing which the problems of cost-allocation have upon the issues of statutory interpretation.[3] And the Comptroller General has plainly recognized, contrary to respondents' statements, that the petitioner has views on cost-allocation and has made such allocations; see, *e. g.*, his report for 1956, H. Doc. 210, 85th Cong., 1st Sess., p. 16, referring to "the Company's views on allocation of general corporate expense". Respondents cannot deny that this litigation involves disputes over petitioner's accounting and allocation practices simply because they choose to label those practices as "ambiguous

[1] The brief in opposition of Grace Line, Inc., et al., to the petition for certiorari in No. 251 contains similar statements (cf. pp. 2–3).

[2] See also pp. 52–53, dealing with questions of rate fixing and cost allocation. Respondents' rebuttal brief deals with accounting problems at pp. 3–4.

[3] Cf. our Main Brief, pp. 80–84; Reply Brief, pp. 10–20.

bookkeeping." One man's accounting and allocation methods frequently appear to another man as "ambiguous bookkeeping."

II

Respondents' second objection to the opinion centers around the statement (356 U. S. at 312) that "[i]t was learned that if the Canal were operated at cost, the tolls would have to be raised to a prohibitive level. Congress therefore undertook to reduce the financial burden that was imposed upon the users of the Canal". But the fact remains that if the tolls were required to earn the full cost of operating the Canal, including the interest charges as they existed in 1950 and the free transit of Government vessels, they would have to be close to $1.40 per net vessel ton.[4] Congress therefore reduced the financial burden of the Canal—thus reducing the cost to be recovered by tolls and making possible the establishment of toll rates at levels then expected to be in the neighborhood of $.95 to $1.00. This was done by lowering the interest charges, abolishing the free transit of Government vessels, and providing that the profit of the supporting activities (if any) should be used to pay a part of the cost of the Canal Zone Government.[5]

Respondents also object to this passage in the opinion on the ground that it "seems to imply that re-

[4] Senator Knowland pointed out that this toll rate would "completely dry up any coastwise traffic through the Canal". *Miscellaneous Bills*, Hearing before the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess., on S. 2222, etc., September 7, 1950, p. 18.

[5] Petitioner's Main Brief, pp. 14-17, 86-88; Petitioner's Reply Brief, pp. 4-6.

spondents are trying to get tolls fixed at less than cost" (Application, p. 5). If that implication exists, we do not believe that respondents have any reason to complain of it. Under the Comptroller General's own evaluation of the problem, respondents are seeking to have the tolls fixed under a formula which will not reflect true costs. As we have shown in our Main Brief (pp. 19–20) and in our Reply Brief (pp. 7, 17), the Comptroller General insists that a deficit in the operation of the supporting activities constitutes a legitimate element of the cost of maintaining and operating the Canal, and that the failure to recover it through tolls would constitute a subsidy to the Canal users at the expense of the American taxpayer.[6]

III

Respondents likewise ask for the elimination of the words "at least" from the sentence, "It is at least arguable that Congress to date has sided with petitioner and against the Comptroller General in construing §§ 411 and 412 of the Code" (356 U. S. at 319). In substance, respondents seek by this device to attack the point that Congress has ratified petitioner's action by the passage of three appropriation acts after having been advised of this dispute.[7]

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[6] We pointed out in our petition for a writ of certiorari in No. 251 (p. 37, fn. 70) that, during congressional hearings, one of respondents' spokesmen had to concede that the Comptroller General did not consider respondents' position morally correct.

[7] We may note, initially, how belated is this portion of respondents' application. Petitioner made its argument as to Congressional ratification in its Main Brief (pp. 136–138), and on oral argument, and respondents had ample opportunity to answer it in their Main Brief, as well as in their Rebuttal Brief.

The claim seems, first, to be that the congressional action on petitioner's budget pursuant to Section 104 of the Government Corporation Control Act (31 U. S. C. 849) does not constitute an "approval" because the appropriation legislation does not use that specific language. The budget programs of Government corporations, however, are submitted to Congress as part of the annual budget (Government Corporation Control Act, Section 103, 31 U. S. C. 848); Congress acts upon them in appropriation acts (Petitioner's Main Brief, pp. 22, 137); and it utilizes the procedures of the Government Corporation Control Act to exercise detailed control over petitioner's operations (Petitioner's Main Brief, p. 53). Indeed, as this Court has pointed out recently, the Government Corporation Control Act "provides such close budgetary, auditing and fiscal controls that little more than corporate name remains to distinguish it [the Government corporation] from the ordinary government agency" (*Rainwater* v. *United States*, October Term, 1957, No. 276, decided May 26, 1958, slip opinion, p. 2). In these circumstances, we submit that the legislative action under Section 104 of the Government Corporation Control Act is fully equivalent to ordinary appropriations, which have frequently been held to be ratification of executive or administrative action.

Respondents' second argument, based on S. Rept. 2375, 84th Cong., 2d Sess., is that Congress clearly adopted an attitude of "studied neutrality". S. Rept. 2375, however, did not relate to an appropriation act but to legislation which never even reached the floor of the Senate. The other legislative expressions re-